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Workers' Compensation

John E. Collins

WORKERS' COMPENSATION

by

*John E. Collins**

THE past survey year did not include a legislative session and thus, in the words of one court, there was no risk, from a legislative standpoint, of any person losing their life, liberty, or property in the workers' compensation arena.[1] Enactments from previous sessions, however, provided substantial fodder for the appellate gristmill.

One general trend that should be noted is that workers' compensation cases filed in Texas district courts are on the increase, as are total dispositions of lawsuits involving workers' compensation benefits.[2] The pendulum has clearly swung back toward trial litigation in this area of the law, contrary to a trend in the late 1960s and early 1970s, which saw fewer cases filed and fewer cases disposed of by jury verdict.[3]

I. SUBSTANTIVE LAW

Course of Employment. The Texas Workers' Compensation Act[4] requires that for an employee's injury to be covered it must be sustained in the course of employment.[5] The phrase "course of employment" includes injuries of "every kind and character having to do with and originating in the work, business, trade or profession of the employer."[6] Recently, in *Carson v. Industrial Underwriters Insurance Co.*[7] a jury finding denying

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* B.A., Baylor University; J.D., University of Texas. Attorney at Law, Irving, Texas.

1. *See* Estate of A.B., 1 Tucker 249 (N.Y. Sur. Ct. 1866): "[N]o man's life, liberty or property are safe while the Legislature is in session."

2. Statistics from 51 TEX. CIV. JUD. COUNCIL & OFFICE OF COURT ADMIN. ANN. REP. 130 (1979) show the following number of new cases filed in Texas district courts during the five years previous to 1980:

1975	1976	1977	1978	1979	5-year average
6,239	7,567	7,823	8,406	7,962	7,599

Figures from the annual reports also indicate the following number of cases tried to a jury verdict:

1975	1976	1977	1978	1979	5-year average
334	446	527	514	482	460

Id. at 133; 50 TEX. JUD. COUNCIL & OFFICE OF COURT ADMIN. ANN. REP. 142 (1978); 49 TEX. JUD. COUNCIL & OFFICE OF COURT ADMIN. ANN. REP. 141 (1977); 48 TEX JUD. COUNCIL ANN. REP. 116 (1976); 47 TEX. JUD. COUNCIL ANN. REP. 120 (1975).

3. *See* Collins, *Workmen's Compensation, Annual Survey of Texas Law*, 28 SW. L.J. 131, 131 (1974).

4. TEX. REV. CIV. STAT. ANN. arts. 8306-8309i (Vernon 1967 & Supp. 1980-1981).

5. *Id.* art. 8309, § 1 (Vernon 1967).

6. *Id.*

7. 586 S.W.2d 943 (Tex. Civ. App.—Waco 1979, no writ).

Act coverage was reversed on appeal. In *Carson* an employee-teacher was injured as she was unloading teaching supplies and materials from her car at the religious school where she was employed. A trial court jury refused to find that she was injured in the course and scope of her employment.[8] The appellate court observed, however, that there was simply "no evidence" that the worker did not receive an injury at the time and in the manner she described.[9] The teacher testified that the school did not have the special supplies that she intended to use during her class on the date of her injury. She further stated that it was a part of the teacher's job to bring supplies to the school. Thus, the court held that the jury's failure to find that Carson was injured in the course and scope of her employment was against the great weight and preponderance of the evidence.[10]

In *Texas Employers' Insurance Association v. Miller*[11] a jury verdict for the plaintiff was sustained when the plaintiff's decedent was found dead at a trash pit on a dairy farm where he normally tended to odd jobs.[12] The evidence indicated that it was part of the decendent's regular duties to collect and burn trash, that his body was found lying in the trash pit where the trash was burned, and that the trash had been collected and burned properly earlier that morning. The court found this to be sufficient evidence, both legally and factually, to support the jury's finding that the decedent was both an employee and was in the course and scope of his employment at the time of his death.[13]

Similarly, the Waco court of civil appeals in *Texas Employers' Insurance Association v. Lee*[14] found that a carpenter who was run over by his own car in a parking lot near a construction site was injured in the course and scope of his employment pursuant to the "access doctrine."[15] The court observed that the access doctrine enables an employee to recover for on-the-job injuries that occur within "a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done."[16] In the instant case the carpenter had to walk through streets to get to work and return on the streets to his automobile. The court reviewed the important cases dealing with the access doctrine in Texas[17] and noted that the extraordinary circumstances that produced the injuries in this case occurred within a few minutes after work and while the employee was preparing a safe route to leave in his automobile from an area within his employer's work site, designated and maintained by the employer for employee parking.[18]

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8. *Id.* at 945.
9. *Id.* at 944.
10. *Id.* at 945.
11. 596 S.W.2d 621 (Tex. Civ. App.—Waco 1980, no writ).
12. *Id.* at 624, 627.
13. *Id.* at 624.
14. 596 S.W.2d 942 (Tex. Civ. App.—Waco 1980, no writ).
15. *Id.* at 943-47.
16. *Id.* at 943.
17. *Id.* at 945-47.
18. *Id.* at 947.

Analysis similar to the access doctrine has prevailed in other cases. For example, Monte Whiting was a ranch foreman and lived south of Midland, Texas, in a trailer house on a company trucking yard.[19] He was on call twenty-four hours a day. One evening after work, he went out to check on some trucks and began drinking. He fired several shots from a pistol he was carrying and a deputy sheriff and highway patrolman drove to the trucking yard. As the law enforcement officers approached Whiting, he was shot and killed. At the time of his death, a pathologist testified that his blood alcohol was .18. The jury found that Whiting was injured within the course and scope of his employment.[20] The appellate court affirmed this jury finding,[21] noting that if an employee is required to live on his employer's premises, either by contract or by the nature of the employment, and is continuously on call, the entire period of his presence on the premises is deemed to be included in the course of his employment.[22]

An unusual situation arose in *United States Fire Insurance Co. v. Biggs*,[23] a case involving a part-time law clerk employed in Amarillo in the law offices of Tom Upchurch, Jr. One of Upchurch's associates instructed the clerk, Biggs, to make repairs to the associate's apartment roof. Biggs testified that before his injury the associate told him that this was one of his duties as a clerk and that he should list it on his hours for the law office. Upchurch, the employer, testified however, that he would not have permitted the law clerks to perform personal missions for the associates. As fate would have it, during his repair of the roof, Biggs fell two stories to a concrete driveway and sustained injuries. The Amarillo court of civil appeals held that the record compelled a holding that as a matter of law the injuries were not sustained in the course of the law clerk's employment.[24] The court observed that the evidence was conclusive that Biggs's injury had no connection with the practice of law.[25] Also, there was no testimony to the effect that the associate had authority as the employer's agent to direct Biggs's actions beyond the scope of Upchurch's practice or profession. Biggs was placed in an unfortunate dilemma: if he complied with the associate's order, he forfeited any compensation protection, and if he did not comply, he argued that he would have been fired. The appellate court observed, however, that there was no evidence in the record that

19. United States Fidelity & Guar. Co. v. Whiting, 597 S.W.2d 504 (Tex. Civ. App.—El Paso 1980, no writ).

20. *Id.* at 505.

21. *Id.* at 505, 507.

22. *Id.* at 506. Additionally, the appellate court observed that the opinion testimony from the pathologist was not conclusive and was not binding on the jury since there was substantial testimony from the wife that shortly before the shooting the decedent was sober. *Id.* at 507.

23. 601 S.W.2d 132 (Tex. Civ. App.—Amarillo 1980). [Editor's Note: After this Article went to print, the supreme court reversed the holding of the court of civil appeals. 611 S.W.2d 624 (Tex. 1981). This decision will be discussed in next year's *Survey*].

24. 601 S.W.2d at 135.

25. *Id.* One could argue, however, that the undisputed record in this case clearly indicates that but for Biggs's employment at Upchurch's law office, he would not have been on the roof on the day of his injuries.

Biggs's employer, Upchurch, would have fired him had he refused to perform the personal mission for the associate.[26] From a close reading of the evidence, it does appear that there was a factual dispute as to whether the injured employee was instructed by an associate to perform certain duties during his working hours as a law clerk. Further, the record establishes that he was told to follow orders given by anyone in the office. Thus, there does seem to be a factual dispute in this case, a dispute that the jury resolved in the law clerk's favor.[27] Nevertheless, the Amarillo court of civil appeals saw it in a different light.

In the only case dealing with the "course and scope" issue decided by the Texas Supreme Court during the survey period, the court held in *Freeman v. Texas Compensation Insurance Co.*[28] that a telephone company employee was in the course and scope of his employment when he was killed in a one-car collision after having taken a polygraph examination at the request of his employer.[29] Because there was evidence, or at least an inference from the evidence, that the decedent had been directed by his employer to take the polygraph test, the court ruled that the case came within the "special mission" exception[30] to article 8309, section 1(b),[31] which normally bars recovery for injuries sustained by an employee while traveling.[32]

Employee Versus Independent Contractor. Cases continue to arise under the Act concerning the question of whether an individual is entitled to the benefits of the compensation scheme itself. In *Bogard v. Highlands Insurance Co.*[33] the plaintiffs' decedent was found dead in his pickup truck on the lease of a drilling company. The decedent performed pumping chores for the drilling company and had entered into a written contract that contained a paragraph describing him as an independent contractor. The plaintiffs sought to circumvent the contractual provision by submitting evidence from a former drilling company employee to the effect that this simple contractual provision did not reflect the actual working practice. The court held that this testimony did not raise a fact issue as to the "right of control" test as set forth in *Newspapers, Inc. v. Love*,[34] which held that evidence outside the contract must be produced to show that despite the terms of the primary agreement the true operations were such that the right of control was vested in the alleged master.[35] Consequently, the

26. *Id.* at 137.
27. *Id.* at 132.
28. 603 S.W.2d 186 (Tex. 1980).
29. *Id.* at 192.
30. TEX. REV. CIV. STAT. ANN. art. 8309, § 1b (Vernon 1967) provides for an exception when "the employee is directed in his employment to proceed from one place to another place."
31. *Id.*
32. 603 S.W.2d at 192.
33. 601 S.W.2d 957 (Tex. Civ. App.—El Paso 1980, no writ).
34. 380 S.W.2d 582, 591-92 (Tex. 1964).
35. 601 S.W.2d at 958-59.

plaintiffs in *Bogard* were held not entitled to benefits.[36]

Suits Against Nonsubscribers, Employers. In one of the more significant cases decided during the survey period, the court in *Copelin v. Reed Tool Co.*[37] held that the exclusive remedy provision of the Workers' Compensation Act[38] did not prohibit a wife's cause of action against an employer for loss of consortium.[39] In *Copelin* the wife's husband sustained severe brain damage that left him in a coma. The parties had stipulated that at the time of the accident the injured worker was employed by a subscriber to Texas Workers' Compensation Insurance and that the employee was injured in the course of his employment. The wife alleged that her husband's injury was caused by the employer's "intentional misconduct."[40] On these facts and allegations the court ruled that constitutional prohibitions[41] prevented the Act from being a complete bar to the wife's cause of action.[42] The court went on to say that because the wife's recovery for personal injuries was her separate property,[43] her rights as a nonemployed spouse could not be forfeited by the employment of her husband by a subscriber to workers' compensation insurance.[44]

An unusual fact situation arose in *Hazelwood v. Mandrell Industries Co.*[45] In 1973, a Houston employer, a nonsubscriber, sought to limit its responsibility for industrial injuries and death claims by making a contract with its employees that benefits for on-the-job injuries and death would be limited to monetary amounts provided by the "industrial compensation laws of the State of Texas *and such compensation provision shall be the limit of our liability to yourself and your dependents in the event of a claim by you against the Company for personal injuries*."[46] An employee died in Africa while working for this employer, and his surviving widow sought to recover more than the amounts provided under the Texas Workers' Compensation Act. The court noted that voluntary employment contracts providing that recoveries for industrial injuries sustained while working for a nonsubscribing employer were to be determined by the measure of benefits provided under the Workers' Compensation Act had been held valid and enforceable by several courts.[47] In this case, however, because the employer did not waive its right to assert its common law defenses, the

36. *Id.* at 959.

37. 596 S.W.2d 302 (Tex. Civ. App.—Houston [14th Dist.] 1980). The judgment of the court of civil appeals was affirmed by the supreme court, 24 Tex. Sup. Ct. J. 96 (Dec. 6, 1980).

38. TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967).

39. 596 S.W.2d at 303-04.

40. *Id.* at 303.

41. TEX. CONST. art. I, § 13 provides that "every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."

42. 596 S.W.2d at 303-04.

43. *Id.* at 304; *see* Whittlesey v. Miller, 572 S.W.2d 665 (Tex. 1978).

44. 596 S.W.2d at 304.

45. 596 S.W.2d 204 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

46. *Id.* at 205 (emphasis added).

47. *Id.*

court ruled that the contract was contrary to public policy, despite the fact that it may not have resulted in actual injury to the plaintiffs.[48] The court adopted as its test for determining whether a contract is contrary to public policy the tendency of the agreement to be injurious to the public good.[49]

In *Harrison v. Harrison*[50] an employer was found guilty of a failure to furnish reasonably safe and suitable machinery to an employee who was injured by a log that fell from a loaded log truck.[51] The employer was a nonsubscriber at the time of the injury in question and was thus deprived of his common law defenses of contributory negligence, assumption of the risk, and fellow servant negligence.[52] In this case the evidence revealed that the trailer from which the logs fell was in bad shape, the standards that held the logs were bent, and the springs of the trailer were weak. The court found that this evidence was sufficient to support the jury's finding that the employer failed to provide reasonably safe and suitable machinery to the employee.[53]

In *Gray v. City of Orange*[54] a city policeman was killed in the course and scope of his employment for the city of Orange, Texas. The city, however, was not carrying workers' compensation insurance, nor had it qualified as a self-insuror pursuant to article 8309e-2.[55] The decedent's survivors sued the city for its failure to take any action to see that compensation benefits were provided city employees. The city answered that the matters alleged in the plaintiff's petition arose out of and were connected with the exercise of police power by the city, a governmental function, for which the city was not responsible at law. The Beaumont court of civil appeals ruled that the self-insurance provisions of the Workers' Compensation Act were merely permissive and, thus, the statute created no duty on the part of the city to provide workers' compensation insurance for its employees.[56]

Appealing Industrial Accident Board Awards—Deadlines. Cases continue to arise each survey period that deal with the deadlines involved in appealing an award of the Industrial Accident Board. Article 8307, section 5 states in mandatory terms that an appeal from a board award *shall* be filed within twenty days after the appealing party has given the statutory notice of appeal to the board.[57] Although the point seems rather elementary, Texas courts again dealt with cases wherein the appealing party failed to name the proper opposing parties in a lawsuit filed in district court. In

48. *Id.* at 206.
49. *Id.*
50. 597 S.W.2d 477 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.).
51. *Id.* at 479.
52. TEX. REV. CIV. STAT. ANN. art 8306, § 1 (Vernon 1967).
53. 597 S.W.2d at 485.
54. 601 S.W.2d 100 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.).
55. 1973 Tex. Gen. Laws, ch. 88, § 18, at 200 (codified at TEX. REV. CIV. STAT. ANN. art. 8309h (Vernon Supp. 1980-1981)).
56. 601 S.W.2d at 101-02.
57. TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (Vernon Supp. 1980-1981).

New York Underwriters Insurance Co. v. Ehlinger[58] the board awarded death benefits to the widow and two children of a worker. The insurance carrier, however, named only the decedent-worker as the defendant in its appeal to the district court. The carrier argued that its failure to name the beneficiaries was merely a "misnomer" of parties and, thus, that its appeal was timely filed against the beneficiaries. The appellate court rejected this argument, holding that the naming of only the deceased as the defendant was insufficient to confer jurisdiction over the remaining beneficiaries.[59] Because the beneficiaries were not joined until after the twenty-day period for appeal had expired, the Court ruled that the trial court had no jurisdiction and that it had properly dismissed the suit.[60]

The timeliness of an appeal obviously affects the right of the parties to raise venue challenges in that the statute now provides that a suit may be filed in the county where the injury occurred, or in the county where the injured worker resided at the time of the injury.[61] In *Garcia v. Texas Employers' Insurance Association*[62] the sole question before the court was whether the premature filing of a suit in district court in Hidalgo County conferred jurisdiction on that court. The worker, who maintained his residence in Hidalgo County, was injured in Hale County. Before the Industrial Accident Board entered its award, the worker filed suit in the county of his residence. The appellate court held that no jurisdiction was vested in the district court and that the race for fixing venue does not commence until after the award has been made by the board.[63] The court reasoned that if there is no award to set aside, there can be no litigation in the district court because the cause of action has not matured until an award is entered by the board.[64]

The 1979 Texas Supreme Court decision in *Ward v. Charter Oak Fire Insurance Co.*,[65] in which the court ruled that if a notice of appeal is deposited in the mail one day prior to the expiration of the twenty-day statutory period, and received by the board not more than ten days after the expiration of that period, it shall be deemed timely filed,[66] was again construed in *Tamez v. Texas Employers' Insurance Association*.[67] In *Tamez* the injured worker mailed his notice of intent to appeal on the twentieth day after the board's award, and the notice of intent to appeal was received by the board on the twenty-first day. The appellate court ruled that this notice was not timely, however, because, under *Ward*, a notice of intent to appeal must be mailed by first-class mail, properly addressed and stamped,

58. 593 S.W.2d 432 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).
59. *Id.* at 433.
60. *Id.*
61. TEX. REV. CIV. STAT. ANN. art. 8307a (Vernon Supp. 1980-1981).
62. 597 S.W.2d 519 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).
63. *Id.* at 520.
64. *Id.*
65. 579 S.W.2d 909 (Tex. 1979).
66. *Id.* at 910-11.
67. 599 S.W.2d 115 (Tex. Civ. App.—Dallas 1980, no writ).

at least one day *before* the last day of the time period.[68] As the notice in *Tamez* was not mailed until the last day of the twenty-day period, the court ruled that it was not timely filed by mail.[69] This result seems harsh. Because the appellate time periods for civil cases have been relaxed to some extent,[70] it would seem reasonable to do the same in the workers' compensation area.

Good Cause. One of the procedural requirements facing a workers' compensation claimant is that the claim for compensation benefits must be filed within six months from the date of injury.[71] Notice of the injury must also be given to the employer within thirty days following the injury.[72] These two hurdles may be circumvented if "good cause" is established for late filing of the claim or for the failure to give the employer notice within the prescribed period.[73]

A self-employed claimant successfully established the "good cause" requirement in *Pan American Fire & Casualty Co. v. Hill*.[74] The claimant, the owner of an independent gasoline and oil distributing company, injured his left hip while at work. The insurance carrier paid all medical and compensation benefits for eight months and had the claimant sign a document designated "employee's wage agreement." Previously, the injured employee had signed the "employer's first report of injury" that was filed with the board. The court upheld the jury's finding in favor of "good cause" based largely on the claimant's testimony that the insurance adjuster, whom he had known since 1958, visited him in the hospital and told him everything would be taken care of.[75]

In *Burleson Independent School District v. Johnston*[76] an injured employee was successful in establishing that she felt that her back injuries were trivial and thus that she had good cause for delaying to file her claim for compensation benefits for some thirty-four months after her accident. After the claimant sustained her back injury she continued to work as a cook in a school cafeteria. She stated that she wanted to work and believed that her back condition would get better; it continued to bother her, however, and worsened until finally she could no longer work. The jury resolved the good cause issue in favor of the injured worker, and the appellate court affirmed, stating that the facts were such that a jury question was created as to whether her belief that her injuries were not serious would have been entertained by a reasonably prudent person in the same

68. *Id.* at 117.

69. *Id.*

70. Modifications in appellate procedure governed by the Texas Rules of Civil Procedure are discussed in Figari, *Texas Civil Procedure*, p. 393 *infra*.

71. TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (Vernon 1967).

72. *Id.*

73. *Id.*

74. 586 S.W.2d 187 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.).

75. *Id.* at 190.

76. 598 S.W.2d 35 (Tex. Civ. App.—Waco 1980, no writ).

or similar circumstances.[77]

Another claimant obtained a reversal of a summary judgment in favor of the insurance carrier on the issue of good cause when she established facts to support her failure to file a compensation claim for a period of some twenty-two months. In *LeBlanc v. Maryland American General Insurance Co.*[78] the injured worker sustained a back injury while lifting a crate of tomatoes and was off work for between seven and nine days. She then went back to work on light duty. No physician informed her that she had a serious injury, but she later had to have back surgery. After her injury and up until the time she filed her claim, the claimant maintained that she did not believe that her injury was serious even though she had periodic episodes of pain. Because the insurer presented no evidence to counter this belief, the appellate court ruled that a genuine issue of material fact existed as to whether the claimant had good cause for filing late.[79]

An unusual procedural wrinkle was introduced in *Texas General Indemnity Co. v. Bomer*.[80] There the insurance carrier argued that the trial court had committed error in permitting a trial amendment that alleged good cause for failure to file a compensation claim within the allotted time. In his original petition, the plaintiff alleged that timely notice was given to the Industrial Accident Board. The insurance company denied this allegation, but the trial court allowed the plaintiff to file a supplemental pleading that alleged good cause.[81] The defendant failed to object to the motion for leave to file a supplemental pleading, did not plead surprise, and did not ask for a continuance at that time. The appellate court observed that allowing trial amendments is within the sound discretion of the court and, that in this instance, no abuse of discretion was shown.[82] On the merits of the good cause issue the court found that there was sufficient evidence to support the jury's finding of good cause in that the plaintiff introduced evidence that the plaintiff's doctor had informed him that he was recovering and that his suffering was unrelated to his injury.[83]

Another appeal from a summary judgment order in favor of the insurance carrier was at issue in *Turner v. Liberty Mutual Insurance Co.*[84] There the claimant alleged in her amended petition that she had timely filed a claim for compensation with the board within six months of her injury or, in the alternative, that if the claim had not been timely filed, she had good cause for failing to do so. The insurance carrier answered with a general denial and later moved for summary judgment. In response to the motion for summary judgment, the claimant answered and attached her affidavit asserting good cause for her failure to file her claim in time. The

77. *Id.* at 37.
78. 601 S.W.2d 750 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.).
79. *Id.* at 754.
80. 588 S.W.2d 645 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).
81. *Id.* at 646.
82. *Id.*
83. *Id.* at 646-47.
84. 592 S.W.2d 14 (Tex. Civ. App.—Texarkana 1979, no writ).

claimant further argued that the trial court had improperly rendered summary judgment because the insurance carrier had failed to file a sworn denial of her allegations concerned good cause, and that, under rule 93(n) of the Texas Rules of Civil Procedure, such an allegation is conclusively presumed to be true. The appellate court agreed with both arguments and overturned the trial court's grant of summary judgment.[85] The court further stated that there was no waiver of the verification point even though the claimant failed to point out in time the lack of a verified denial because the insurer had never raised the issue of good faith in the form of a denial.[86]

Notice to the employer is also required when an "occupational disease" is at issue.[87] Article 8307, section 4a requires that the worker provide notice to the employer or insurance carrier "within thirty . . . days after the happening of an injury or the first distinct manifestation of an occupational disease."[88] Likewise, the Act requires that if an injured worker sustains an injury flowing from an occupational disease that is the result of repetitious traumatic physical activity, then notice is required from the date "disability" is caused thereby.[89] In *Home Insurance Co. v. DeAnda*[90] the worker claimed compensation benefits as a result of repetitious traumatic activity, which is defined as an occupational disease under the statute.[91] The insurance company denied that it or the employer had received notice within the thirty-day period. The appellate court found that the undisputed evidence indicated that the worker had incurred a "disability" from the repetitious traumatic activity long before the time that notice of the occupational disease was given.[92] The court believed that the statutory period did not begin to run from the date of total disability, but rather from the date that any compensable disability occurred.[93] Consequently, the claimant was denied recovery because the compensable disability occurred more than thirty days before notice was given.[94]

A similar notice problem arose in *Commercial Insurance Co. v. Smith*.[95] In that case the worker claimed disability as a result of an allergic reaction to chemical substances used by her employer in its manufacturing process. The issue was at what time the occupational disease first distinctly manifested itself. The insurance carrier by sworn denial contended that the employer did not have notice within the statutory time limits. One of the interesting aspects of this case is that no jury issues were submitted on the

85. *Id.* at 16.
86. *Id.*
87. TEX. REV. CIV. STAT. ANN. art. 8307, § 4 (Vernon 1967).
88. *Id.*
89. *Id.*
90. 599 S.W.2d 124 (Tex. Civ. App.—Eastland 1980), *rev'd*, 24 Tex. Sup. Ct. J. 160 (Dec. 31, 1980).
91. TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1980-1981).
92. 599 S.W.2d at 125.
93. *Id.* at 126.
94. *Id.*
95. 596 S.W.2d 661 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).

notice question. Although there was no dispute as to whether the worker's supervisor had notice of the occupational disease on the day following the diagnosis, there was some dispute as to whether the worker had suffered difficulties a year or so before her symptoms were actually diagnosed as an occupational disease. The appellate court acknowledged the problems in dealing with establishing a fixed date for a gradually or slowly developing condition.[96] It observed that occupational diseases manifest themselves at different times.[97] As a result, the court held that the time limitation for notice begins to run when the claimant, as a reasonable man or woman, recognizes the nature of the disease.[98] The court ruled that in the instant case notice had been established as a matter of law.[99]

Wage Rate. Disputes over the wage rate appear in the reported decisions on a regular basis. Because weekly compensation benefits are on the rise, this element of the claimaint's case will become increasingly important in the future.[100]

In *Texas Employers' Insurance Association v. Miller*[101] the insurance carrier argued that the "just and fair wage rate" could not be used as a measure of average weekly wage as defined in article 8309, section 1.[102] In general a claimant must first prove that the average weekly wage cannot be computed under the first two subsections of the definition of average weekly wage contained in article 8309 before being entitled to rely on the just and fair method of proving average weekly wage.[103] Pursuant to a request for admissions under rule 169,[104] the claimant established that the deceased had not worked 210 days of the year immediately preceding his death, and that there were not one or more employees of the same class as the deceased who worked at least 210 days of the year immediately preceding his death. The appellate court thus found that the carrier essentially had admitted that the average weekly wage computation could not be performed under the first two methods provided by article 8309, section 1.[105] Accordingly, the court affirmed the trial court's submission of the just and fair wage rate issue.[106]

In *Pan American Fire & Casualty Co. v. Hill*[107] an unusual wage rate

96. *Id.* at 664.
97. *Id.*
98. *Id.* at 665.
99. *Id.*
100. As of Sept. 1, 1980, the weekly compensation rate was $133, and a total and permanent disability award for 401 weeks, discounted, now totals $46,005. *See* TEX. REV. CIV. STAT. ANN. art. 8306, § 29 (Vernon Supp. 1980-1981). As a result of a 1973 amendment, the weekly compensation rate is automatically increased by $7 per week for each $10 increase in the manufacturing and production worker's average weekly wage in Texas as annually determined and reported by the Texas Employment Commission. *Id.*
101. 596 S.W.2d 621 (Tex. Civ. App.—Waco 1980, no writ).
102. TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967).
103. 596 S.W.2d at 625; *see* TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967).
104. TEX. R. CIV. P. 169.
105. 596 S.W.2d at 625.
106. *Id.*
107. 586 S.W.2d 187 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.).

problem arose when the president of a small corporation was injured on the job. The company president, due to his retirement, drew no salary or wages during the year preceding the injury. It was established, however, that the corporation was making $100 per week that was being retained by it as profit. The injured employee argued that these retained profits constituted an "other advantage" to be used in calculating the correct average weekly wage pursuant to subsection four of the definition contained in article 8309.[108] In a rather restrictive interpretation of that subsection the appellate court did not "believe" that this earned profit was the equivalent of a wage or salary.[109] Another procedural problem that prevented the employee from receiving full compensation benefits centered around a wage rate stipulation that was presented to the board and the trial court, providing that a fair and just weekly compensation rate should be the sum of $19.20 per week. Because there was no objection to the offering of the stipulation, the appellate court found no trial court error in entering judgment based on the stipulation.[110]

Medical Causation and Heart Attacks. The connection between an on-the-job event and a resulting injury annually produces some of the most hotly contested cases in workers' compensation law.[111] The past survey year was no exception.

An instructed verdict in favor of the insurance company was affirmed in *Cavazos v. Fidelity & Casualty Co.*[112] when the injured worker failed to produce evidence that his job was strenuous or that, on the day in question, he actually engaged in an activity involving overexertion or an unusual stress.[113] The plaintiff sought compensation benefits following a stroke. This case apparently was tried on an "accidental injury" theory,[114] and the appellate court observed that it must first determine whether there was evidence "of an undesigned, untoward event involving overexertion or strain which is traceable to a definite time, place and cause."[115] The court went on to stress that the fact that an employee sustains an injury while on the employer's premises is not sufficient to establish a right to recovery

108. TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967).

109. 586 S.W.2d at 191.

110. *Id.*

111. *See, e.g.*, Stodghill v. Texas Employers' Ins. Ass'n, 582 S.W.2d 102 (Tex. 1979); Henderson v. Travelers Ins. Co., 544 S.W.2d 649 (Tex. 1976); Webb v. Western Cas. & Sur. Co., 517 S.W.2d 529 (Tex. 1974); Baird v. Texas Employers' Ins. Ass'n, 495 S.W.2d 207 (Tex. 1973); Griffin v. Texas Employers' Ins. Ass'n, 450 S.W.2d 59 (Tex. 1969); Insurance Co. of North America v. Kneten, 440 S.W.2d 52 (Tex. 1969).

112. 590 S.W.2d 173 (Tex. Civ. App.—Corpus Christi 1979, no writ).

113. *Id.* at 175-76.

114. The Workers' Compensation Act defines an injury to mean "damage or harm to the physical structure of the body." TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1980-1981). To be compensable the injury must be shown to have been accidental. Henderson v. Travelers Ins. Co., 544 S.W.2d 649, 650 (Tex. 1976).

115. 590 S.W.2d at 175 (citing Olson v. Hartford Accident & Indem. Co., 477 S.W.2d 859, 859 (Tex. 1972)).

under the Act.[116] In this case the court found no evidence that the claimant suffered an injury on the day in question within the purview of the Workers' Compensation Act.[117] The opinion provides an excellent catalogue of stroke and heart attack cases in which recovery was denied because there was no evidence to support a finding that the claimant's stroke or heart attack resulted, at least in part, from some type of overexertion or strain experienced during the course of employment.[118]

Disputes frequently arise as to whether an injury has been caused by an on-the-job "event" so as to make the injury work-related. In *Lumbermen's Underwriting Alliance v. Bell*[119] a thirty-two-year-old worker suffered a heat stroke and died a short time thereafter. The attending physician stated that the death was caused by cardiac arrest due to heat stroke. An autopsy was performed, and the pathologist concluded that certain medications may have been a factor in the death. The insurance carrier attempted to argue that the deceased was taking Navane and Mellaril for a nervous condition that was unrelated to his job, and that these drugs had precipitated his untimely demise. The trial court, however, refused to admit the pathologist's testimony.[120] The appellate court sustained this exclusion, stating that the insurance carrier failed to establish properly that the deceased actually took the drugs in question at or near the time of his death.[121] The court reasoned that this "possibility" evidence was too speculative to be admitted.[122]

An interesting medical causation question arose in *Texas Employers' Insurance Association v. Schaefer*,[123] in which the claimant attempted to establish that his disease, mycobacteriosis intracellular, arose out of the course and scope of his employment. The plaintiff, a plumber, frequently worked in soil contaminated by human feces and on occasion went under houses where different kinds of fowl as well as sheep and goats had been kept. The plaintiff's expert witness stated that, based on reasonable medical probability, the claimant's disease was an occupational disease.[124] The

116. 590 S.W.2d at 176 (citing Whitaker v. General Ins. Co. of America, 461 S.W.2d 148, 151 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.)).

117. 590 S.W.2d at 176.

118. *Id.*

119. 594 S.W.2d 569 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.).

120. *Id.* at 570.

121. *Id.* at 571.

122. *Id.* at 572.

123. 598 S.W.2d 924 (Tex. Civ. App.—Eastland 1980), *aff'd*, 24 Tex. Sup. Ct. J. 163 (Jan. 3, 1981).

124. 598 S.W.2d at 926. The question propounded to the plaintiff's medical witness and the answer thereto were as follows:

> Q. (A)ssume the term occupational disease means a disease which arises out of and in the course of employment which causes damage or harm to the physical structure of the body and I'll ask you whether or not you have an opinion based on reasonable medical probability as to whether the atypical tuberculosis from which Mr. Schaefer is suffering, as it applies in his case, whether it is an occupational disease within that definition?
>
> A. Yes, sir. I think it is.

Id.

court found, however, that the medical evidence was inconclusive as to how the bacteria actually entered the claimant's body.[125] Further, the court found no indication that the disease had ever been found in the county or in the particular soil where the plaintiff worked.[126] The appellate court concluded that the medical expert's testimony, in substance, revealed that it was based on mere possibilities and conjecture.[127] The court thus held that the plaintiff had failed to establish an occupational disease.[128] The court then dealt with the plaintiff's theory of repetitious physical traumatic activity.[129] A questionable result was reached when the court concluded "that mycobacteriosis intracellulare is, in this case, an 'ordinary disease of life to which the general public is exposed outside of the employment.' "[130] If the medical causation link was missing in the plaintiff's presentation of the case, a quantum leap seems to be required for one to conclude that a mysterious disease is "an ordinary disease of life."

In *Texas Employers' Insurance Association v. Booth*,[131] a heart attack case, an injured employee recovered for the effects of an injury pursuant to article 8306, section 20,[132] which defines occupational disease. The claimant presented evidence of job-related anxiety, tensions, pressure, overwork, and mental and physical strain accompanied by repetitious physical and emotional traumatic activity. Further, he presented evidence showing that his work had increased, and that two men in his department had resigned and were never replaced. The injured employee's physician testified that the employee suffered from arteriosclerotic heart disease with recent acute myocardial infarction. The jury returned findings in favor of the injured employee, but further found that the claimant suffered incapacity as a result of arteriosclerosis and that this incapacity contributed fifty percent to his occupational disease incapacity.[133] The carrier argued that article 8306, section 22[134] prohibited recovery when an occupational disease is aggravated by any other noncompensable disease or infirmity and that the heart attack constituted one disease while the arteriosclerosis was another, noncompensable, disease. The Amarillo court of civil appeals rejected this argument, noting that the insurance company did not attempt to establish by medical evidence that the diagnosed condition was in fact two diseases.[135] Therefore, because the evidence established that the injured employee had suffered only one disease, the court ruled that the carrier was precluded from receiving any contribution as a result of a

125. *Id.* at 927.
126. *Id.*
127. *Id.* at 927-28.
128. *See id.*
129. *Id.* at 928; *see* TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1980-1981).
130. 598 S.W.2d at 928.
131. 586 S.W.2d 181 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.).
132. TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1980-1981).
133. 586 S.W.2d at 182.
134. TEX. REV. CIV. STAT. ANN. art. 8306, § 22 (Vernon 1967).
135. 586 S.W.2d at 183.

noncompensable condition.[136]

In another heart injury case, *Fair v. St. Paul Insurance Co.*,[137] the worker attempted to show that he had sustained an accidental heart injury and that the jury's failure to find such injury[138] was against the great weight and preponderance of the evidence. The claimant was employed as a road construction equipment operator and, after working for approximately fifteen minutes on the day in question, he had to leave the job as a result of chest pain and other symptoms. The worker's medical witness indicated that operating heavy equipment in cold weather could well aggravate or become an aggravating cause of heart pain to anyone who had preexisting heart diseases, but the appellate court concluded that the jury's finding of "no injury" was not against the great weight and preponderance of the evidence.[139]

Subsequent Injuries and Sole Cause. There was only one case decided during the survey period discussing whether an insurance company's liability for an injury can be reduced by evidence of previous or subsequent injuries that are the sole cause of the plaintiff's disability. In *Liberty Mutual Insurance Co. v. Peoples*[140] the plaintiff, a truck driver, sustained a back injury in January 1976, but had sustained earlier injuries in 1972 and 1974 that resulted in his receiving a laminectomy and a discetomy. The claimant also suffered another injury in May 1977, and the insurance company argued that this injury was the "sole cause" of plaintiff's disability. The trial court excluded evidence showing that the worker had sustained the injury subsequent to the one at issue and that the claimant, once again, had to undergo back surgery.[141] The appellate court examined article 8306, section 12c,[142] its amendments, and the major cases interpreting that section,[143] and concluded that, at the time of the injury to the plaintiff, the 1971 amendment to article 8306, section 12c clearly made the carrier liable "for all compensation."[144] The court noted that under this amendment *Texas Employers' Insurance Association v. Creswell*[145] had held that "proof of a prior compensable injury was inadmissible for the purpose of reducing the worker's recovery."[146] Proof of such prior injuries, however, was admissible for the purpose of showing that the prior injury was the *sole*

136. *Id.*
137. 602 S.W.2d 577 (Tex. Civ. App.—Amarillo 1980, no writ).
138. *Id.* at 578.
139. *Id.* at 582.
140. 595 S.W.2d 135 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.). One other case allowed prior injury evidence to be admitted when, essentially, there was no objection by plaintiff's counsel. Watkins v. Charter Oak Fire Ins. Co., 592 S.W.2d 50 (Tex. Civ. App.—Texarkana 1979, no writ).
141. 595 S.W.2d at 137.
142. TEX. REV. CIV. STAT. ANN. art. 8306, § 12c (Vernon Supp. 1980-1981).
143. 595 S.W.2d at 138-40.
144. *Id.* at 139.
145. 511 S.W.2d 58, 70 (Tex. Civ. App.—Eastland 1974, writ ref'd n.r.e.).
146. 595 S.W.2d at 139.

cause of the claimant's present disability.[147] In a rather exhaustive analysis of past cases dealing with the prior and subsequent injury issue, the *Peoples* court stated: "It can fairly be concluded that we are without guidance as to the admissibility of evidence of the effects of a later injury."[148] The court further correctly pointed out that article 8306, section 12c[149] uses the phrase "previous injury" and that to include within that phrase "subsequent" injuries strains its construction.[150] Nevertheless, in reversing the trial court's judgment for the plaintiff, the court ruled that evidence of the subsequent injury was admissible, stating that "to impose on an insurer liability for permanent and total incapacity produced solely by an injury other than that which gave rise to the litigation would be to adopt an indefensibly harsh rule."[151]

Suits to Set Aside Compromise Settlement Agreements. The overwhelming majority of workers' compensation claims are settled by compromise settlement agreements.[152] This procedure is authorized when the insurance carrier's liability *or* the extent of the employee's injury is: (1) uncertain; (2) indefinite; or (3) incapable of being satisfactorily established.[153] Under certain conditions, however, settlement agreements may be set aside, usually by district court determination.

In order to set aside a compromise settlement agreement in a workers' compensation case, the plaintiff must show that false representations were made by the insurance carrier or its agent, that the plaintiff relied on such representations, that the claim was meritorious, and that the plaintiff's injury is greater than the amount paid pursuant to the compromise settlement agreement.[154] In *Middleman v. Atlantic Mutual Insurance Co.* [155] the wife of a deceased worker was successful in overturning a motion for summary judgment granted in favor of the insurance carrier. The court found that the wife's summary judgment proof raised a fact issue as to whether the insurance company's agent fraudulently misrepresented the workers' compensation law to her and misinformed her about the timeliness of filing her claim for compensation death benefits.[156] The appellate court observed that "fraud vitiates every transaction tainted by it."[157] The wife in this case did not even file her suit to set aside the agreement for about

147. *Id.* (citing Mayfield v. Employers Reinsurance Corp., 539 S.W.2d 398, 399 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.)).

148. 595 S.W.2d at 139.

149. TEX. REV. CIV. STAT. ANN. art. 8306, § 12c (Vernon Supp. 1980-1981).

150. 595 S.W.2d at 139-40.

151. *Id.* at 140.

152. *See* TEXAS INDUSTRIAL ACCIDENT BOARD 1980 ANNUAL REPORT 30, which indicates that 36,337 claims were settled pursuant to compromise settlement agreements between the parties and approved by the board.

153. TEX. REV. CIV. STAT. ANN. art. 8307, § 12 (Vernon 1967).

154. Brannon v. Pacific Employers Ins. Co., 148 Tex. 289, 293, 224 S.W.2d 466, 468 (1949).

155. 597 S.W.2d 565 (Tex. Civ. App.—Waco 1980, no writ).

156. *Id.* at 568.

157. *Id.*

six years. She alleged that she did not learn about how unfair the settlement was until that time and thus limitations in her case begun to run from the time that the fraud might have been discovered by the use of reasonable diligence.[158]

A worker was successful in setting aside a compromise settlement agreement when she established that the insurance carrier's medical statements with respect to the length of her disability were inaccurate.[159] The insurance company submitted the written reports of the doctors to the claimant and her attorney at a prehearing conference where the settlement agreement was reached. Because the insurer used the doctors' reports in settling the case, the court ruled that such use made the doctors agents of the insurer.[160] The court concluded that the fact that false representations were made was sufficient to overturn the settlement and held that the "[a]bsence of bad faith does not negate the claimant's cause of action."[161]

In a similar case,[162] a worker was unsuccessful in setting aside a compromise settlement agreement in that he was unable to prove that the inaccurate doctor's reports grew out of any conduct of the insurance company. In this case, the injured worker consulted his own doctor for treatment of his injury, and there was no proof or showing that any misrepresentations or false statements were made by an authorized agent of the insurance carrier.[163]

Injury and Occupational Disease. During the survey period the appellate courts continued to define the parameters of article 8306, section 20,[164] which were broadened in 1971 to change the definition and scope of the term "injury" as it is used in the Act. In 1979 the Texas Supreme Court in *Transportation Insurance Co. v. Maksyn*[165] held that repetitious *mental* stimuli extending over a period of time did not fall within the definition of "injury." The Austin court of civil appeals expanded on the *Maksyn* holding in *University of Texas System v. Schieffer*.[166] There the injured worker was employed in a language laboratory at the University of Texas at Austin and testified that she was under a heavy work load and that a supervisor's conduct resulted in her having a nervous breakdown. The university system argued that Mrs. Schieffer's injuries were not compensable under

158. *See* Wise v. Anderson, 163 Tex. 608, 611, 359 S.W.2d 876, 879 (1962).

159. Yarbrough v. Texas Employers' Ins. Ass'n, 591 S.W.2d 556 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.).

160. *Id.* at 558.

161. *Id.*; *see* Graves v. Hartford Accident & Indem. Co., 138 Tex. 589, 595, 161 S.W.2d 464, 466-67 (1942).

162. Valdez v. Commercial Union Assurance Cos., 602 S.W.2d 345, 346 (Tex. Civ. App.—San Antonio 1980, no writ).

163. *Id.* at 346; *see* Bullock v. Texas Employers' Ins. Ass'n, 254 S.W.2d 554, 556 (Tex. Civ. App.—Dallas 1952, writ ref'd).

164. TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1980-1981).

165. 580 S.W.2d 334, 338 (Tex. 1979). For a more extended discussion of this significant case, see Muldrow, *Workers' Compensation, Annual Survey of Texas Law*, 34 Sw. L.J. 323, 331-32 (1980).

166. 588 S.W.2d 602 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

the statute. The court observed that her experience with her supervisor had no relationship to "repetitious *physical* traumatic activities."[167] The claimant sought to rely on the expert testimony of two psychologists who diagnosed her condition as a hysterical neurosis with a passive-aggressive personality trait that resulted in a loss of weight, tightened chest, loss of voice, spasms, and an inability to cope with her job. The appellate court believed that this testimony established that *mental* stimuli produced the condition for which compensation was sought,[168] thus running afoul of the holding in *Maksyn*.[169] The court further observed that the trial court's definition of injury failed to conform with the *Maksyn* definition by failing to define the term with respect to "accidental injury" and that the worker failed to secure an independent finding by the jury on accidental injury.[170] Accordingly, judgment was reversed and rendered in favor of the University of Texas System.[171]

Another case involving the definition of occupational disease and injury was *Aetna Casualty & Surety Co. v. Burris*.[172] In that case the claimant was a truck driver who argued that he sustained both an injury and an occupational disease. The claimant asserted that he was required physically to exert himself in driving a Mack truck and that such driving subjected him to severe jolting up and down. He further alleged that he had great difficulty in turning the truck in cities when the traffic was heavy, that he was forced to drive long trips, and that he was forced to make such trips too close to each other without rest or nourishment. The appellate court observed that there was no evidence of any repetitious physical traumatic activity arising out of the course of his employment as a truck driver.[173] Rather, the court found that the proof supported a claim for compensation based on repetitious mental activities and thus fell within the *Maksyn*[174] rule prohibiting such cause of action.[175] Additionally, both physicians who testified in the case indicated that all of the occupational diseases complained of by the claimant were ordinary diseases of life to which the general public is exposed and were not indigenous to the worker's job as a truck driver.[176] The court thus found that the "ordinary diseases of life" defense was established as a matter of law pursuant to article 8306, section 20.[177]

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167. *Id.* at 604 (emphasis added).
168. *Id.* at 605.
169. 580 S.W.2d at 338.
170. 588 S.W.2d at 605.
171. *Id.* at 606.
172. 600 S.W.2d 402 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.).
173. *Id.* at 406.
174. 580 S.W.2d at 338.
175. 600 S.W.2d at 406.
176. *Id.*
177. *Id.* at 406-07. TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (Vernon Supp. 1980-1981) provides in part: "Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where such diseases follow as an incident to an 'Occupational Disease' or 'Injury' as defined in this section."

Death Benefits. On September 1, 1973, the Texas Workers' Compensation Act was amended to allow a widow or widower of a deceased employee compensation in the form of lifetime weekly benefits.[178] In the event of remarriage, the beneficiary is also entitled to receive a lump sum payment equal in amount to the benefits due for a period of two years.[179] There is no clear indication in the statute, however, as to what effect remarriage has on the liability of the carrier to remaining beneficiaries.

In *Freeman v. Texas Compensation Insurance Co.* [180] the supreme court held that upon remarriage, the surviving spouse is to receive a lump sum payment equal to the amount of benefits that the spouse would have received if there had been no remarriage.[181] Additionally, concerning the remaining beneficiaries, the court indicated that although the eligibility of various beneficiaries may change, the overall amount of the carrier's liability remains unaffected.[182] Thus, the court ruled that redistribution of the weekly benefits to the remaining beneficiaries is necessary after remarriage.[183] In order to avoid exceeding the statutory limitation on weekly benefits set forth in article 8306, section 8(a),[184] however, the court held that redistribution of the benefits to the minor survivors should not occur until two years after remarriage.[185]

In another death benefits case[186] the Fort Worth court of civil appeals ruled that the widow of a husband who died at work had no cause of action against the workers' compensation insurance carrier under the Texas Deceptive Trade Practices—Consumer Protection Act[187] when it failed to settle "promptly and fairly" her compensation claim.[188] The court found that the decedent was not a consumer within the Act in that he had not purchased goods or services from the insurance company.[189]

In *Carswell v. Aetna Casualty & Surety Co.* [190] an employee's heirs sought to recover the unpaid portion of a lump sum award made by the Industrial Accident Board. Prior to his death the injured employee filed suit to set aside the lump sum award. The court ruled that the employee's claim did not survive the employee's death when the death was unrelated to the on-the-job injuries.[191] The court acknowledged the general rule that a claim

178. TEX. REV. CIV. STAT. ANN. art. 8306, § 8 (Vernon Supp. 1980-1981).
179. *Id.* § 8(b).
180. 603 S.W.2d 186 (Tex. 1980).
181. *Id.* at 189 (citing TEX. REV. CIV. STAT. ANN. art. 8306, § 8(b) (Vernon Supp. 1980-1981)). For a similar holding, see Blankenship v. Highlands Ins. Co., 594 S.W.2d 147, 149-52 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).
182. 603 S.W.2d at 189.
183. *Id.* at 189-90.
184. TEX. REV. CIV. STAT. ANN. art. 8306, § 8(a) (Vernon Supp. 1980-1981).
185. 603 S.W.2d at 191.
186. Rodriguez v. Texas Employers' Ins. Ass'n, 598 S.W.2d 677 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).
187. TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon Supp. 1980-1981).
188. 598 S.W.2d at 679.
189. *Id.* at 678.
190. 598 S.W.2d 20 (Tex. Civ. App.—Texarkana 1980, no writ).
191. *Id.* at 21.

for specific injury benefits does survive the death of an employee and may be enforced by the employee's heirs, but stated that a claim or even an award of benefits for a general injury does not survive the injured employee's death unless the award has been reduced to a final judgment or has otherwise fully matured.[192] The court further observed that there is no statutory provision for the survivability of a claim for general injury.[193]

Wrongful Discharge. Article 8307c[194] prohibits an employer from discharging or discriminating against an employee because the worker, in good faith, has filed a compensation claim, hired a lawyer, or instituted any proceedings under the Act. Only one case addressed the issue of wrongful discharge during the survey period. In *Murray Corp. v. Brooks*[195] the employer failed to persuade a jury that it had legitimate reasons for discharging an injured worker.[196] The employee was a long-haul truck driver who had filed two previous workers' compensation claims and was discharged following a spinal fusion operation due to his most recent injury. It was undisputed that the injured worker was not given a reason for his discharge until his lawyer propounded interrogatories to the employer in the discrimination lawsuit. In that suit the employer belatedly attempted to argue that the worker was more than usually "accident prone," thus creating a danger to himself and exposing the employer to unreasonable risks of liability. The employer also argued that an economic downturn was an additional reason for the injured worker's discharge. The appellate court meticulously reviewed the evidence and concluded that the employer knew that the injured worker was making compensation claims and that the payment of workers' compensation claims by the insurance company would raise the employer's insurance rates.[197] Thus, the court concluded, there was probative evidence to support the jury finding that the injured worker was discharged or discriminated against because he instituted proceedings under the Workers' Compensation Act.[198]

The employer was likewise unsuccessful in arguing that the evidence was insufficient to support the jury's finding that the discharge was a "proximate cause" of any damage to the plaintiff. The court observed that the statute does not require that the discharge be a proximate cause of the damage suffered by an employee, only that damages suffered be "a result of the violation."[199]

Nursing Services. When an injured worker's spouse provides nursing services that are usually performed by a person engaged in the nursing profes-

192. *Id.* at 22. *See also* Bailey v. Travelers Ins. Co., 383 S.W.2d 562 (Tex. 1964).
193. 598 S.W.2d at 22.
194. TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1980-1981).
195. 600 S.W.2d 897 (Tex. Civ. App.—Tyler 1980, no writ).
196. *Id.* at 899.
197. *Id.* at 903.
198. *Id.* at 903-04.
199. *Id.* at 904.

sion, the insurance carrier is liable for compensation benefits for those nursing services, but a spouse cannot recover for services that are normally rendered in the course of the marital relationship.[200] In *United States Fidelity & Guaranty Co. v. Roberts*[201] a jury's award of $30,000 to the wife of an injured worker for a two-year period of nursing services was upheld as being within the range of evidence presented to the trial court.[202] The injured worker had received various injuries in a drilling rig explosion that severely impaired his ability to take care of himself. As a result, the injured worker's spouse had to provide twenty-four-hour nursing services to her husband. The insurance carrier argued that $30,000 was excessive and that the services could be provided at a cheaper rate, but this argument was rejected by the appellate court, which stated that even though the amount awarded was high, it was not excessive under the evidence presented.[203]

In another case involving nursing services[204] the injured worker's husband was held not entitled to recover for cooking services and household cleaning following her back surgery.[205] The jury simply refused to find that nursing services were required as a result of the injuries in question.[206]

Hernia Injury. Even though the Workers' Compensation Act has been in existence since 1913, the question of whether an employee is entitled to weekly benefits from the date of the injury to the date of a hernia operation had never been resolved. The Texas Supreme Court addressed this issue in *Clem v. Dallas Independent School District*,[207] wherein Clem had been totally disabled for some fifty-seven weeks before his successful hernia operation. The school district paid Clem twenty-six weeks of compensation, but refused to pay the additional benefits for the remaining thirty-one weeks between the date of his injury and the date of his operation. Chief Justice Greenhill observed that because section 12b of article 8306[208] did not make a provision for disability from the time of the injury to the time of the operation, an employee must be compensated for that period of time as a general injury.[209] It was further noted that the specific language of the statute stated that the ceiling of twenty-six weeks' worth of compensation is limited to disability suffered *after the operation*.[210] As a result, the supreme court held that Clem was entitled to fifty-seven weeks of compen-

200. Transport Ins. Co. v. Polk, 400 S.W.2d 881 (Tex. 1966); Finch v. Texas Employers' Ins. Ass'n, 564 S.W.2d 807 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).
201. 598 S.W.2d 49 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.).
202. *Id.* at 51.
203. *Id.*
204. Rendon v. Texas Employers' Ins. Ass'n, 599 S.W.2d 890 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.).
205. *Id.* at 896.
206. *Id.* at 892. Note, however, that no instructions were given the jury with regard to nursing services. *Id.*
207. 600 S.W.2d 925 (Tex. 1980).
208. TEX. REV. CIV. STAT. ANN. art. 8306, § 12b (Vernon 1967).
209. 600 S.W.2d at 926.
210. *Id.*

sation benefits.[211]

Third-Party Actions. In the event that the conduct of a party other than the employer causes injury to an employee, suit may be brought against such a third party to recover damages over and above benefits received under the Act.[212] In a case of first impression in Texas, *Cohn v. Spinks Industries, Inc*,[213] a surviving widow and a child sued the decedent's employer for fatal injuries arising out of a helicopter crash. The plaintiffs argued that the employer was strictly liable in tort under the "dual capacity" doctrine. The dual capacity doctrine arises when an employer, normally exempted from tort liability, arguably becomes liable in tort to his employee if he occupies a second capacity that confers on him obligations independent of those imposed on him as an employer.[214] The defendant answered the plaintiff's argument by saying that because the decedent was an employee he was covered by workers' compensation insurance, and therefore, the defendant-employer was entitled to the immunities prescribed by article 8306, section 3 of the Act.[215] The appellate court observed that there were no Texas cases that directly addressed the applicability of the dual capacity doctrine to workers' compensation law.[216] The court noted that the arguments against adoption of the doctrine were more compelling under the current state of Texas law.[217] The court believed that the adoption of such a doctrine would do considerable violence to the statutory language indicating a legislative intent that the workers' compensation remedies be exclusive.[218]

Article 8307, section 6a was substantially amended in 1973.[219] These amendments specifically eliminated the requirement that an injured employee proceed against the compensation carrier before asserting a third-party action.[220] Questions continue to arise, however, concerning the effect of those amendments. In *Penguin Industries, Inc. v. Junge*[221] the third party argued that limitations on the plaintiffs' claims should begin to run on September 1, 1973, when the impediment to third-party claims was removed by amendment. In this case, the plaintiffs' injuries occurred on or about July 10, 1973. The Waco court of civil appeals rejected this argument, noting that when the cause of action arises prior to September 1, 1973, the third-party action is governed by article 8307, section 6a as it existed prior to the 1973 amendments.[222] Under the earlier version of sec-

211. *Id.* at 927.
212. TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (Vernon Supp. 1980-1981).
213. 602 S.W.2d 102 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).
214. *Id.* at 103.
215. TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967).
216. 602 S.W.2d at 102.
217. *Id.* at 104.
218. *Id.*
219. TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (Vernon Supp. 1980-1981).
220. *Id.*; *see* Robinson v. Buckner Park, Inc., 547 S.W.2d 60, 61-62 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.).
221. 589 S.W.2d 842 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).
222. *Id.* at 847.

tion 6a,[223] the statute of limitations was tolled for third-party actions during the prosecution of the workers' compensation claim.[224] For causes of action arising after September 1, 1973, the limitation period begins to run from the date of injury and is governed by the general statute of limitations, article 5526.[225] Thus, under *Junge*, the amendments to article 8307, section 6a are prospective only.[226]

Article 8306, section 3,[227] the exclusive remedy provision, comes into play in third-party cases when the third party seeks contribution or indemnity from the employer. That statute specifically provides that the subscriber-employer has no liability to reimburse the third party, nor does the subscriber have any tort or contract liability to the third party "in the absence of a written agreement expressly assuming such liability, executed by the subscriber prior to such injury or death."[228] In *General Elevator Corp. v. Champion Papers*[229] the third party argued that article 8306, section 3 is in conflict with the Texas Comparative Negligence Act,[230] and that this later statute either repeals or takes precedence over the former article.[231] The appellate court rejected this argument on the ground that there is no specific language in the comparative negligence statute that expressly repeals article 8306, section 3, and further, that there was no basis for any repeal by implication.[232] The third party also argued that it should be entitled to contribution from a grossly negligent employer. This argument, likewise, was rejected in that it is prohibited by the express terms of article 8306, section 3.[233] The court stated that a third party is barred from receiving contribution even though the survivors of an employee may recover against a grossly negligent employer.[234]

In another case[235] construing the provisions of article 8306, section 3, the court held that an owner may seek contribution and indemnity from a drilling contractor for injuries to the drilling contractor's employee when a contract specifically providing for such indemnity was executed before the employee's injury.[236] In this case the trial court granted summary judgment in favor of the drilling contractor-employer when the third-party owner sought contribution or indemnity arising out of an employee's in-

223. 1917 Tex. Gen. Laws, ch. 103, pt. IV, § 3b, at 293.
224. Campbell v. Sonford Chem. Co., 486 S.W.2d 932, 934 (Tex. 1972).
225. 589 S.W.2d at 847; TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon Supp. 1980-1981).
226. 589 S.W.2d at 848. *See also* Potter v. Crump, 555 S.W.2d 206 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.); Robinson v. Buckner Park, Inc., 547 S.W.2d 60 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.).
227. TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967).
228. *Id.*
229. 590 S.W.2d 763 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).
230. TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1980-1981).
231. 590 S.W.2d at 764.
232. *Id.* at 764-65.
233. *Id.* at 765.
234. *Id.*; *see* TEX. REV. CIV. STAT. ANN. art. 8306, § 5 (Vernon 1967).
235. Petroleum Exploration & Operating Corp. v. McCutchen Drilling Co., 593 S.W.2d 831 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).
236. *Id.* at 833.

jury.[237] Due to the existence of a written contract, the appellate court reversed the trial court, holding that the Workers' Compensation Act was not a bar to the contribution and indemnity suit brought by the third party against the employer.[238]

Article 8307, section 6a, as amended in 1973,[239] provides for the recovery of attorney's fees for the claimant's attorney in third-party cases in which the compensation carrier also obtained a recovery from the third party. During the survey year, there were two cases that reversed awards of attorney's fees to claimant's attorneys because of the insufficiency of the evidence to support the trial court's finding pertaining to the attorney's fee. In *Insurance Co. of North America v. Stuebing*[240] the trial court entered an award in favor of the claimant's attorney for services rendered in the prosecution of the third-party action.[241] The compensation carrier had also retained counsel to actively represent its interest. In this situation, the statute provides that the court "shall award and apportion an attorney's fee allowable out of the association's subrogation recovery between such attorneys taking into account the benefit accruing to the association as a result of each attorney's service, the aggregate of such fees not to exceed thirty-three and one-third per cent (33-1/3%) of the subrogated interest."[242] The Fort Worth court of civil appeals found that although the award of an attorney's fee to claimant's counsel was appropriate in this case, the evidence presented was insufficient to support an award of $5,500: the claimant's lawyers, though proving their time expended in rendering services in the case, failed to present proof of the value of that time.[243] Thus, on retrial, the court suggested that care be taken in proving the total of the attorneys' time and that the proof should be restricted to the time devoted to an investigation of the facts and the law with respect to the prosecution of the third-party tort action.[244] *Stuebing* clearly indicates that in order to recover an attorney's fee from the compensation carrier's subrogation, claimant's counsel must present accurate time records and proof of time and efforts expended, as well as evidence concerning the value of that time.[245]

In the event that an insurance carrier does hire an attorney to actively represent its interest, a fact issue may still arise as to whether the insurance company's lawyer did indeed "actively" participate in the prosecution of the third-party action. This was the situation in *International Insurance Co. v. Burnett & Ahders, Associated*.[246] There the compensation carrier retained a lawyer and filed a plea in intervention in the third-party case;

237. *Id.* at 832.
238. *Id.* at 833.
239. TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (Vernon Supp. 1980-1981).
240. 594 S.W.2d 565 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).
241. *Id.* at 566.
242. TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (Vernon Supp. 1980-1981).
243. 594 S.W.2d at 568.
244. *Id.*
245. *Id.*
246. 601 S.W.2d 199 (Tex. Civ. App.—El Paso 1980. writ ref'd n.r.e.).

the intervention, however, was filed after the defendant's deposition had been taken. The trial court awarded fees to the claimant's counsel and specifically found that the insurance company's interest was not actively involved or not "actively represented" by an attorney.[247] On appeal, the El Paso court of civil appeals expressed some frustration with the amendments to article 8307, section 6a, stating that they may serve as a model of confusing legislation.[248] Nevertheless, the court observed that there were three separate conditions under which an attorney for a claimant may recover attorneys' fees out of the compensation carrier's subrogation award:

(1) Where the intervenor is represented by counsel, but he does not actively represent the intervenor,
(2) Where the claimant's attorney represents both the claimant and the intervenor, and
(3) Where the intervenor is represented by an attorney who actively represents the intervenor's interest.[249]

The appellate court found that there was insufficient evidence to support the trial court's finding that the insurance company's lawyer had not actively participated in the lawsuit.[250] The court noted that the insurance company's lawyer reviewed the compensation file, filed a plea of intervention, sought a stipulation as to the amount of the subrogation, and negotiated a settlement with the tortfeasors' lawyer resulting in a payment of $14,000 to the compensation carrier.[251] Accordingly, the court reversed the judgment of the trial court and remanded the case to that court.[252]

The defense of third-party actions is sometimes full of traps for the unwary, as illustrated by *Guerrero v. Standard Alloys Manufacturing Co.*[253] The plaintiff in *Guerrero* recovered damages for hand injuries that he received while operating a grinding machine. At trial a defensive issue was raised as to whether the plaintiff was a "borrowed servant" at the time of his injury and whether his exclusive remedy was under the Workers' Compensation Act. The jury found that the defendant-employer had the right to direct and control the details and methods by which the plaintiff was working on the occasion in question, thus rendering the defendant liable if found negligent.[254] The defendant, however, neither pleaded nor proved that it had workers' compensation insurance. The appellate court ruled that without proof of coverage, judgment should have been entered below for the plaintiff.[255]

II. PROCEDURAL LAW

Variation Between Claim and Pleadings. A claimant may not assert one

247. *Id.* at 200.
248. *Id.*
249. *Id.* at 201.
250. *Id.*
251. *Id.* at 202.
252. *Id.*
253. 598 S.W.2d 656 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.).
254. *Id.* at 657.
255. *Id.*

injury before the Industrial Accident Board and a claim of an entirely different character at the courthouse; for the trial court to have jurisdiction, the cause of action asserted in the district court must be essentially the same as that filed with and acted upon by the Industrial Accident Board.[256] An interesting aspect of this rule was presented in *Martinez v. Commercial Standard Insurance Co.*[257] Notice of injury was filed with the board on its form, stating that a nail had hit the injured worker in his left eye, injuring both eyes. In the "Claimant's Narrrative Summary," the attorney asserted that the case had developed into a general injury in that the claimant developed a psychiatric problem out of fear of losing his eyesight. In the trial court, the claimant alleged a general injury. The insurance carrier filed a plea in abatement, which was sustained by the trial court, that asserted a fatal variance between the claim presented to the board and the one before the trial court.[258] The appellate court reserved and denied the insurance company's arguments, stating that even though there was no amended claim filed, a claimant's narrative summary could be a proper enlargement of the original claim and was deemed to be such in this case because it was not at variance with the court pleadings.[259]

Another interesting pleading point was raised in *Cope Construction Co. v. Power*.[260] There the injured worker was thrown from the tailgate of a company pickup truck. The insurance carrier filed suit to set aside the Industrial Accident Board award, questioning whether the claimant was injured in the course of his employment. The claimant countered by filing a common law tort claim in the same county against his employer. The insurance carrier filed a motion to consolidate both actions, along with a plea of privilege in the tort action. The appellate court ruled that, without reserving its right to file a plea of privilege, the employer had waived its plea of privilege by insisting on its motion to reconsider the court's decision to consolidate the actions.[261] The court viewed the motion to reconsider as an attempt to invoke "the judicial power of the court in a manner inconsistent with a continuing intention to insist upon the plea."[262]

Estoppel. In *Safeco Insurance Co. of America v. Broadnax*[263] the claimant had filed a lawsuit against Travelers Insurance Company asserting that he was an employee of a labor placement agency. He settled his lawsuit in court and later asserted that he was a borrowed servant of the employer to whom he had been sent by the placement agency. The claimant subse-

256. Select Ins. Co. v. Patton, 506 S.W.2d 677, 680-81 (Tex. Civ. App.—Amarillo 1974, no writ); Solomon v. Massachusetts Bonding & Ins. Co., 347 S.W.2d 17, 19 (Tex. Civ. App.—San Antonio 1961, writ ref'd).

257. 599 S.W.2d 858 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.).

258. *Id.* at 859.

259. *Id.*

260. 590 S.W.2d 721 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

261. *Id.* at 722.

262. *Id.* (quoting 1 R. McDONALD, TEXAS CIVIL PRACTICE, Venue § 4.40, at 572-74 (rev. ed. 1965)).

263. 601 S.W.2d 466 (Tex. Civ. App.—Dallas 1980, no writ).

quently filed a lawsuit against the second employer. The appellate court held that the claimant was judicially estopped to assert its claim because it was predicated upon facts contrary to those asserted in the previous suit.[264] The court observed, however, that the mere receipt of compensation benefits from one carrier does not preclude a suit against another compensation carrier: "It is the assertion of the right to benefit in a judicial proceeding and a subsequent settlement of the dispute that precludes a subsequent suit based on the same claim but asserting inconsistent facts."[265]

In *Thate v. Texas & Pacific Railway*[266] an injured worker was estopped from asserting a claim under the Federal Employer's Liability Act (FELA).[267] The worker was injured while performing duties in a flatbed railroad car and successfully prosecuted a claim for workers' compensation benefits against a trucking company. In a damage suit against the railroad, he attempted to argue that he was entitled to FELA benefits because he was a borrowed servant of the railroad at the time of the incident. The appellate court held that by his election to represent himself as an employee of the trucking company for purposes of receiving benefits under the Texas Workers' Compensation Act, the employee was estopped from claiming that he was also an employee of the railroad for purposes of recovering under the FELA.[268] Of interest in *Thate* is the fact that the court did not require an actual suit against the compensation carrier in order to bar the subsequent claim against the railroad under the FELA. Apparently, under *Thate*, the mere receipt of benefits under the Act is sufficient to establish the estoppel doctrine. Such a holding may not accurately reflect the state of the law in light of the supreme court's action in a case involving workers' compensation benefits and group medical benefits.

Bocanegra v. Aetna Life Insurance Co.[269] concerned the election of remedies between workers' compensation benefits and a nonoccupational health insurance policy. The claimant asserted a workers' compensation claim for an occupational injury that was disputed by the carrier. This claim ultimately was settled. The claimant then asserted her right to medical expenses for the same condition under the nonoccupational health policy. The supreme court held that an election will not bar a subsequent suit when the original claim is grounded upon uncertain and undetermined facts, depriving the claimant of the requisite knowledge to make an informed election, and settled for less than the full value because of disputed

264. *Id.* at 467. The court cited the doctrine set forth by the Texas Supreme Court in Lomas & Nettleton Co. v. Huckabee, 558 S.W.2d 863 (Tex. 1977): "[T]he receipt of a settlement in the action against the insurance company, based on an assertion that the loss was covered by insurance, precluded a subsequent suit based on an inconsistent theory, i.e., that the loss was not covered by insurance." 601 S.W.2d at 467. The *Broadnax* court viewed the *Huckabee* rule as equally applicable to a workers' compensation action, in which the subsequent suit is based on an inconsistent allegation that the worker served a different employer at the time of the injury. *Id.* at 468.

265. 601 S.W.2d at 468.

266. 595 S.W.2d 591 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

267. 45 U.S.C. §§ 51-60 (1976).

268. 595 S.W.2d at 595.

269. 605 S.W.2d 848 (Tex. 1980).

liability and the uncertainty of the final outcome.[270] The court held that one may receive something of value by way of settlement under an uncertain claim, without making an election that bars recovery against another person.[271] *Bocanegra* follows the rationale of *Lee v. Texas General Indemnity Co.*,[272] in which the supreme court disapproved of a lower court opinion holding that testimony that one injury was the sole cause of incapacity created an estoppel from pursuing an action for a prior injury.[273]

The appellate court's holding in *Texas General Indemnity Co. v. McKay*[274] illustrates the critical importance of the pleadings in a motion for a new trial following the granting of a default judgment. In that case the claimant was awarded a default judgment because of the carrier's failure to appear on the date of the trial setting. A motion for a new trial was filed, asserting that the carrier was not given notice of the trial setting; the motion was unsworn, however, and the trial court was given no affidavit or other evidence substantiating any allegedly meritorious defense. The appellate court observed that a medical report attached to the carrier's pleading was not verified as a true copy, and further noted that it was dated a year prior to the trial date and, thus, could not have been relevant or established a defense at the time of trial.[275] The court concluded, therefore, that the insurance carrier failed to meet its burden of setting aside a default judgment, and affirmed the trial court.[276]

Venue. The Texas Workers' Compensation Act was amended in 1977 to provide for venue in several places: the county of the injured worker's residence; the county in which the injury occurred; or the county of the defendant's residence.[277] In *Anderson v. Texas General Indemnity Co.*[278] the injured employee's suit was dismissed by the trial court. Both the employee and the insurance carrier appealed from the Industrial Accident Board's award; the carrier filed suit in Dallas County to set aside the award, while the employee filed suit three weeks later in Tarrant County. The insurance company filed a motion to dismiss the employee's Tarrant County suit, which was granted by the trial court in Tarrant County on the ground that a previously filed suit had been instituted by the carrier in Dallas County.[279] Based on these facts, the court of civil appeals held that the Tarrant County court should more properly have abated the Tarrant County suit pending a resolution of the case in Dallas County, Texas.[280] The court thus held that the trial court erred in dismissing the suit in Tar-

270. *Id.* at 852-53.
271. *Id.* at 852.
272. 584 S.W.2d 700 (Tex. 1979).
273. *Id.* at 701.
274. 595 S.W.2d 884 (Tex. Civ. App.—Waco 1980, writ ref'd n.r.e.).
275. *Id.* at 886-87.
276. *Id.* at 887.
277. TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (Vernon Supp. 1980-1981).
278. 592 S.W.2d 432 (Tex. Civ. App.—Fort Worth 1979, no writ).
279. *Id.* at 433.
280. *Id.*

rant County.[281]

The continuing dispute between Rodolfo A. Reyes and the Texas Employers' Insurance Association once again reached the appellate courts during 1980. In *Reyes v. Texas Employers' Insurance Association*[282] the insurance carrier filed an appeal from a board ruling in Robertson County, Texas, the county where the injury occurred. The employee, Reyes, later filed a plea of privilege to be sued in Maverick County, the county of his residence. Although the insurance company failed timely to controvert Reyes's plea of privilege, the trial court, determining that good cause existed for the late filing, overruled Reyes's plea.[283] Reyes appealed, and the Waco court of civil appeals reversed, finding that good cause was not shown by the carrier and that the carrier's controverting plea was thus of no effect.[284] The Waco court rejected the carrier's argument[285] that a plea of privilege is not the proper way to challenge venue in a workers' compensation case.[286] On April 26, 1979, the court ordered that the case be

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281. *Id.*

282. 599 S.W.2d 838 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.).

283. 581 S.W.2d 268, 269 (Tex. Civ. App.—Waco 1979, writ dism'd).

284. *Id.* at 272.

285. The following is the Waco court of civil appeals' statement of the carrier's unique argument:

> In other words, Appellee argues that under Article 8307, Sec. 5, as amended in 1977, venue is proper in either Robertson County (the place of injury) or Maverick County (the place of Reyes's domicil): that such statute created a "race to the courthouse" in workmen's compensation cases; that if both parties are dissatisfied with the ruling of the Industrial Accident Board, the first party to file suit has his choice of forum; that in the instant case, Texas Employers "won the race" by bringing the suit in Robertson County, thereby precluding Reyes from any right to venue in Maverick County, the county of his residence. Moreover, Appellee says that Article 8307a still requires that if a suit to set aside a final ruling of the Board is brought in any county other than the county where the injury occurred, unless that court has jurisdiction, it must transfer the case to the county where the injury occurred. In short, Appellee asserts that a plea of privilege is not the proper way to challenge venue in a workmen's compensation case, and that "the only proper way to transfer cases brought under Article 8307, Sec. 5 is by a plea to the jurisdiction made under Art. 8307a."

Id.

286. *Id.* at 271 (citing Texas Highway Dep't v. Jarrell, 418 S.W.2d 486 (Tex. 1967); Texas Employers' Ins. Ass'n v. Ellis, 543 S.W.2d 397 (Tex. Civ. App.—El Paso 1976, no writ)).

[Editor's Note: In last year's *Survey* Article on Workers' Compensation the Waco court in *Reyes* was criticized for its reliance upon *Jarrell* and *Ellis*, as well as its failure to mention certain other venue cases. Muldrow, *Workers' Compensation, Annual Survey of Texas Law*, 34 SW. L.J. 323, 353-54 (1980). Specifically, *Ellis* was distinguished as involving TEX. REV. CIV. STAT. ANN. art. 8306, § 19 (Vernon Supp. 1980-1981), which governs the venue of cases brought to set aside an award of the Industrial Accident Board when the injuries have been sustained outside of Texas, rather than *id.* art. 8307, § 5, which governs venue in cases in which the injuries were sustained within Texas. Muldrow, *supra*, at 353. In light of the 1977 amendment of TEX. REV. CIV. STAT. ANN. art 8307, § 5 (Vernon Supp. 1980-1981), a compensation claimant is afforded a choice of counties in which to bring suit. The claimant who has been injured outside of Texas is offered a similar panoply of forums under *id.* art. 8306, § 19. Thus, the holding in *Ellis*, that the proper procedure for the determination of venue in cases involving foreign injuries, and governed by § 19 of art. 8306, is by plea of privilege, Texas Employers' Ins. Ass'n v. Ellis, 543 S.W.2d 397, 400 (Tex. Civ. App.—El Paso 1976, no writ), would seem analogous to the Waco court's decision in *Reyes* that, under art. 8307, § 5,

transferred to Maverick County for a trial on the merits.[287] In the meantime, the carrier had moved the district court in Maverick County to abate and dismiss Reyes's suit because of the carrier's prior filing of an appeal in Robertson County. On May 18, 1979, the Maverick County court abated Reyes's suit and dismissed it with prejudice.[288] The Waco court's order did not become final until May 24, 1979. Reyes appealed the Maverick County court's order to the San Antonio court of civil appeals.

The San Antonio court ignored the merits of the appeal, instead concluding that the case before it was moot.[289] The court reasoned that because the Waco court's transfer of the carrier's suit to Maverick county had become final, and because Reyes had the privilege of litigating in the county of his domicile, there was no need to determine whether the Maverick County court was correct in dismissing Reyes's suit.[290] Accordingly, the court dismissed Reyes's suit and set aside all orders entered therein.[291]

Court's Charge. Numerous procedural wrinkles continue to appear in workers' compensation litigation concerning proper construction and analysis of the court's charge. There are some problems that the *State Bar of Texas, Pattern Jury Charges* book simply does not address. One of these was illustrated in a recent case[292] where the jury dead-locked during deliberation. A supplemental charge was given to the trial court:

> Members of the Jury:
>
> I have your note that you are dead-locked. You request further instructions. This case was ably tried, and in the interest of justice, if you could end this litigation by your verdict, you should do so.
>
> I don't mean to say by that that any individual person on the jury should yield his own conscience and positive conviction, but I do mean that when you are in the jury room, you should discuss this matter among yourselves carefully and listen to each other, and try, if you can, to reach a conclusion on the issues. It is the duty of jurors to keep their minds open and free to every reasonable argument that may be presented by fellow jurors that they may arrive at the verdict which justly answers the consciences of the individuals making up the jury. A juryman should not have any pride of opinion, and should avoid hastily forming or expressing an opinion. He should not surrender any conscientious views founded upon the evidence unless convinced by his fellow juror of his error.
>
> I am satisfied, ladies and gentlemen, that you have not deliberated sufficiently. Accordingly, I return you to your deliberations.[293]

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the plea of privilege is the proper means of contesting venue in a workers' compensation case. 581 S.W.2d at 272.]

287. 581 S.W.2d at 272.

288. 599 S.W.2d at 840.

289. *Id.*

290. *See id.* at 839-40.

291. *Id.* at 841.

292. Anzaldua v. American Guarantee & Liab. Co., 596 S.W.2d 222 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

293. *Id.* at 224.

The appellate court observed that the above charge contained no element of coerciveness on its face, and that this supplemental charge passed the litmus test for supplemental charges as set out by the supreme court in *Stevens v. Travelers Insurance Co.*[294] Thus, the court concluded that there was no error in the above supplemental charge.[295]

Rule 277 of the Texas Rules of Civil Procedure clearly authorizes a disjunctive submission of special issues, when two or more alternate grounds of recovery have been developed through the pleadings, evidence, and the submitted issues.[296] The rules authorize a disjunctive issue dealing with "partial and total incapacity."[297] In *Burns v. Union Standard Insurance Co.*[298] the supreme court specifically endorsed the use of a disjunctive submission to determine whether a worker's disability was a general injury or a specific one.[299] In *Burns* the special issue dealing with the general or specific injury was submitted in the following form:

> "Do you find from a preponderance of the evidence that Plaintiff [Mrs. Burns] received an injury on or about September 30, 1974, which included her hip and back, or was such injury confined to her left foot and leg below the knee?"
>
> "If you find from a preponderance of the evidence that such injury included her left hip and back, you will answer 'It included her hip and back'; otherwise, you will answer 'It was confined to her left foot and leg below the knee.' "
>
> "ANSWER: It was confined to her left foot and leg below the knee."[300]

The injured worker contended that the submission of the issue in this form constituted an inferential rebuttal issue outlawed by rule 277 and by the Texas Supreme Court in *Select Insurance Co. v. Boucher*.[301] The court observed that the evidence of the trial court in this case related almost entirely to the question whether the injury was a general injury to the hip and back rather than a specific one, confined to the foot and leg below the knee.[302] The court ruled that the case fell within the defined parameters of rule 277 authorizing the submission of disjunctive issues and affirmed the trial court.[303]

Numerous alleged errors in the trial court charge constituted the basis for appeal in *Texas Employers' Insurance Association v. Fuentes*.[304] In *Fuentes* the insurance company had admitted, in answers to requests for

294. 563 S.W.2d 223 (Tex. 1978).
295. 596 S.W.2d at 224.
296. TEX. R. CIV. P. 277.
297. Select Ins. Co. v. Boucher, 561 S.W.2d 474, 477 (Tex. 1978).
298. 593 S.W.2d 309 (Tex. 1980).
299. *Id.* at 311.
300. *Id.* at 310-11.
301. 561 S.W.2d 474 (Tex. 1978).
302. 593 S.W.2d at 310-11.
303. *Id.* at 311 (citing 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES § 26.15, at 26 (Cum. Supp. 1976)).
304. 597 S.W.2d 811 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.).

admissions under rule 169,[305] that the worker had suffered total incapacity for some period of time and that the injury was a producing cause of the total incapacity. The special issue that was submitted to the jury read as follows:

> The insurance company has admitted that the injury in question was a producing cause of total incapacity which commenced on the date of injury. Find from a preponderance of the evidence whether such total incapacity has been or will be permanent, or has been or will be temporary.
>
> ANSWER: *Permanent*.[306]

The insurance carrier objected to the submission of the above special issue on the ground that it constituted an impermissible comment directly on the weight of the evidence. The appellate court rejected this argument, holding that where the evidence as to a fact is positive and not disputed, it is to be taken as an established fact and the charge of the court can proceed on that basis.[307] The court further rejected the insurance carrier's arguments pertaining to the definition of producing cause and total incapacity.[308] The trial court had submitted minor modifications of those definitions as found in 2 *State Bar of Texas, Texas Pattern Jury Charges*, section 22.01 (1970). In an earlier time this particular court's charge probably would not have passed appellate muster. Fortunately, our supreme court has modified the rules to prevent the reversal of trial court judgments on mere technicalities.[309]

An injured worker is not entitled to recover for a general injury flowing from a specific injury unless he can prove that the effects of the injury, distinguished from the pain alone, extend to and affect another part of the body.[310] In *American Motorists Insurance Co. v. McMullen*[311] the appellate court reversed a trial court judgment in favor of an injured worker who had received an injury to his hand and recovered a judgment for partial, temporary disability. The insurance carrier tendered the following instruction, which was refused by the trial court:

> An injury to a specific member does not 'extend to and affect' other parts of the body if the use or attempted use of the injured member merely results in pain or other subjective complaints in such other parts of the body without producing damage or harm to the physical structure of such parts.[312]

The Beaumont court of civil appeals observed that it is not very often that a trial court will be reversed for failure to give an explanatory instruc-

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305. TEX. R. CIV. P. 169.

306. 597 S.W.2d at 812.

307. *Id.* (citing Lloyds Cas. Co. v. Grilliett, 64 S.W.2d 1005 (Tex. Civ. App.—Texarkana 1933, writ ref'd)).

308. 597 S.W.2d at 812-13.

309. *Compare* TEX. R. CIV. P. 277 *with* Tex. R. Civ. P. 277 (1941).

310. Texas Employer's Ins. Ass'n v. Shannon, 462 S.W.2d 559, 562 (Tex. 1970).

311. 598 S.W.2d 386 (Tex. Civ. App.—Beaumont 1980, no writ).

312. *Id.* at 386-87. The rejected instruction was suggested in 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES § 26.26, at 8-10 (1970).

tion.[313] In this particular case, however, the court ruled that the instruction was necessary to aid the jury in its factual determinations.[314]

An insurance carrer was able to establish that a trial court's charge constituted an impermissible comment on the weight of the evidence in *Texas Employers' Insurance Association v. Purcell*.[315] The trial court submitted a charge modeled after the "short form" compensation charge appearing in 2 *State Bar of Texas, Texas Pattern Jury Charges* (1970). The trial court, however, failed to condition the producing cause issues on an affirmative finding of injury. The insurance carrier timely and properly objected to these issues as "being on the weight of the evidence in that it assumes or suggests to the Jury the fact of injury."[316] The appellate court observed that by submitting the issues unconditionally, the trial judge assumed an affirmative finding of injury, thereby directly commenting on the weight of evidence, a practice condemned by Texas decisions.[317]

Even though the rules for special issue submission have been balanced on the side of reason, it still behooves counsel for both plaintiff and defendant to listen carefully to the objections leveled at the charge at the time they are made to the trial court. It is indeed frightening to realize that hard work on a case may result in a retrial simply because of a momentary failure to listen carefully to objections that may take no more than five to ten seconds to be made by opposing counsel. W. James Kronzer, Jr. gave some advice in 1961 that is still appropriate today: "From the plaintiff's standpoint, it is a cardinal principle to agree to any objection, or to permit the submission of any issue requested by the defense that does not seriously interfere with the manner by which counsel proposes to submit his case to the jury."[318]

Evidence—Sufficiency. The volume of cases dealing with sufficiency of evidence points seems to be less than in past survey years.[319] Both claimant and insurance carrier, however, continue to contest jury findings on the basis that the findings are against the great weight and preponderance of the evidence. In *Anzaldua v. American Guarantee & Liability Insurance Co.*[320] the injured worker had slipped and fallen on the job, and the jury

313. 598 S.W.2d at 387.

314. *Id.*

315. 594 S.W.2d 182 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.).

316. *Id.* at 184.

317. *Id.* (citing 3 R. McDONALD, TEXAS CIVIL PRACTICE § 12.03.2 (1970)).

318. STATE BAR OF TEXAS, PERSONAL INJURY LITIGATION IN TEXAS § 12.2, at 734 (1961).

319. For cases upholding a jury's finding that a worker was totally and permanently disabled, see Texas Gen. Indem. Co. v. Welch, 595 S.W.2d 205 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.), and City of Bridgeport v. Barnes, 591 S.W.2d 939 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.). The insurance company was successful in overturning a jury's finding of total and permanent incapacity in Texas Employers' Ins. Ass'n v. Flores, 603 S.W.2d 330 (Tex. Civ. App.—El Paso 1980, no writ). Also, claimants were unsuccessful in challenging jury findings of "partial incapacity" in Fuente v. Texas Gen. Indem. Co., 590 S.W.2d 824 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ), and "no injury" in Griffin v. New York Underwriters Ins. Co., 594 S.W.2d 212 (Tex. Civ. App.—Waco 1980, no writ).

320. 596 S.W.2d 222 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

awarded him partial incapacity benefits of approximately $500. The court found that there was evidence to support the jury's finding that some of the worker's complaints were not related to the on-the-job injury, thus warranting a finding of partial incapacity.[321]

321. *Id.* at 225.